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D/LS

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**DIRECTV, INC., a California
corporation,**

Plaintiff,

v.

**AMERILINK CORP., d/b/a NACOM,
an Ohio corporation and PRIMETV,
LLC, a Nevada limited liability
company,**

Defendants.

**AMERILINK CORP., d/b/a RADIO
SHACK INSTALLATION SERVICES,**

Plaintiff,

v.

PRIMETV, LLC,

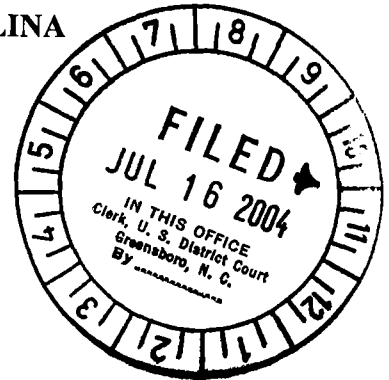
Defendant.

1:01CV00953

(CONSOLIDATED)

1:01CV00820

(CONSOLIDATED)



MEMORANDUM OPINION AND ORDER

SHARP, Magistrate Judge

This matter comes before the Court on (1) a motion by Amerilink Corp. ("Amerilink") for summary judgment (Pleading Nos. 74, 153); (2) a motion by PrimeTV, LLC ("PrimeTV") for partial summary judgment and to modify certain orders (Pleading Nos. 71, 150); (3) a motion by PrimeTV to exclude the reports, affidavits, opinions and testimony of Amerilink's expert, Kelly J. Todd

(Pleading Nos. 91, 170); (4) a motion by Amerilink to supplement the record (Pleading Nos. 111, 189); and (5) a motion by DIRECTV, Inc. ("DIRECTV") to seal certain exhibits (Pleading Nos. 102, 181). The motions have been fully briefed, and the Court heard oral argument on motions (1), (2) and (3) on April 22, 2004. All of the motions are ready for a ruling.

A. PRIMETV'S MOTION TO EXCLUDE AMERILINK'S EXPERT

PrimeTV moves the Court to exclude reports, affidavits, opinions and testimony of Amerilink's expert, Kelly J. Todd. PrimeTV asserts two principal grounds for its motion: (1) Todd is not qualified to give opinions concerning computer data analysis; and (2) Amerilink failed to comply with the expert disclosure requirements of Rule 26(a)(2) of the Federal Rules of Civil Procedure.

For the reasons stated in open court, the Court finds no merit to PrimeTV's argument that Todd is not qualified to give opinions regarding computer data analysis. PrimeTV's challenges to Todd's opinions go, at most, to the weight, and not the admissibility, of her testimony. Evaluating the weight of the testimony is properly left to the trier-of-fact.

In addition, the Court does not find sufficient grounds under Rule 26(a)(2) to strike Todd's testimony, and **IT IS THEREFORE ORDERED** that PrimeTV's motion to exclude Todd (Pleading Nos. 91, 170) be **DENIED**. However, as stated in open court, the Court does find discovery defaults on the part of Amerilink. Accordingly, **IT IS FURTHER ORDERED** that PrimeTV be allowed sixty (60) days from April 22, 2004, the date of oral argument, to re-depose Todd and depose Todd's assistant, Lisa Robbins. The depositions shall take place in Greensboro. Amerilink shall pay the court reporter's fees, and any witness fees and travel expenses associated with these depositions. Each party will pay for its own deposition transcripts. At least twenty (20) days before each such

deposition, Amerilink shall provide PrimeTV with any source codes or queries that either Todd or Robbins used in formulating their opinions in this matter.

B. AMERILINK'S MOTION TO SUPPLEMENT THE RECORD

Amerilink moves the Court to supplement the summary judgment record with pages 286 and 287 of the deposition of its expert, Kelly J. Todd, and a February 18, 2003 letter from Amerilink's counsel to the court reporter who transcribed Todd's deposition. PrimeTV does not object to Amerilink's proposed supplementation. Accordingly, **IT IS HEREBY ORDERED** that Amerilink's motion for leave to supplement the record (Pleading Nos. 111, 189) be **GRANTED**.¹

C. DIRECTV'S MOTION TO SEAL CERTAIN EXHIBITS

DIRECTV moves the Court to place under seal the documents contained in Exhibit 29 filed in connection with Amerilink's motion for summary judgment on the grounds that such documents contain "confidential" information. Neither Amerilink nor PrimeTV object to DIRECTV's motion in this regard, and accordingly, **IT IS ORDERED** that DIRECTV's motion to seal (Pleading Nos. 102, 181) be **GRANTED IN PART**, and that Exhibit 29 filed in connection with Amerilink's motion for summary judgment be placed under seal.

DIRECTV also moves for an order that any other documents originating from DIRECTV and produced by PrimeTV in this litigation be deemed "confidential" pursuant to the Stipulated Protective Order entered by the Court on August 12, 2002. PrimeTV objects to this portion of

¹ PrimeTV objects to certain statements made in Amerilink's motion which PrimeTV claims "are in the nature of a surreply to PrimeTV's memorandum, filed without leave of court." (Pleading No. 113, Def.'s Resp. to Pl.'s Mot. for Leave to Supp. the Record at 1.) The Court notes that, in its review of Amerilink's motion for summary judgment, it has not considered the statements in Amerilink's motion that are responsive to issues addressed in PrimeTV's reply.

DIRECTV's motion on the grounds that such an order would be unduly burdensome on the parties and the Court.

The Court notes that the Stipulated Protective Order on which DIRECTV relies governs "documents and information to be produced by [DIRECTV] in response to Amerilink Corp.'s Amended First Request for Production of Documents to DIRECTV, Inc." (Pleading No. 93, Stipulated Protective Order at 1.) Thus, this Order relates to documents and information DIRECTV produced to Amerilink in response to specific discovery requests. The narrowly tailored order does not entitle DIRECTV to seek a blanket protective order from the Court. If there are remaining or future documents or information which DIRECTV believes should be designated and treated as "confidential," DIRECTV may file an appropriate motion with the Court. Accordingly, **IT IS ORDERED** that DIRECTV's motion to seal (Pleading Nos. 102, 181) be **DENIED** insofar as it seeks an order that any other documents or information originating from DIRECTV and produced by PrimeTV be designated and treated as "confidential."

D. THE PARTIES' DISPOSITIVE MOTIONS

I. Procedural History

Plaintiff Amerilink filed this action in the Superior Court of Moore County, North Carolina on August 13, 2001, alleging claims of breach of contract and *quantum meruit* arising out of Defendant PrimeTV's alleged failure to pay Amerilink \$1,198,115.31 for satellite equipment installations. PrimeTV removed the case to this Court and filed an answer denying the material allegations in the complaint, asserting various affirmative defenses, and bringing counterclaims of breach of contract, unfair or deceptive trade practices and fraud. Amerilink filed a reply denying the material allegations in PrimeTV's counterclaims.

Due to a dispute between Amerilink and PrimeTV regarding ownership of certain commissions paid by DIRECTV to PrimeTV, DIRECTV filed an interpleader action naming Amerilink and PrimeTV as defendants. Pursuant to an order of this Court, DIRECTV continued to pay the commissions to PrimeTV, and PrimeTV was obligated to pay \$15,000 into the registry of the Court each week until the sum of \$1,000,000 was reached. The Court consolidated the interpleader action with Amerilink's original action, and the consolidated lawsuit proceeded through a lengthy discovery period. At the conclusion of the discovery period, the parties filed the instant dispositive motions in a timely manner.

II. Facts

Plaintiff Amerilink is an Ohio corporation that operates a nationwide network of satellite equipment installers. (Pleading No. 1, Compl. ¶ 1; Pleading No. 85, Pl.'s Mem. of Law in Supp. of Mot. for Summ. J., Randy Carpenter Aff. ¶¶ 3-4.)² Defendant PrimeTV is a Nevada corporation with a principal place of business in North Carolina that markets satellite equipment and DIRECTV programming subscriptions to customers throughout the United States. (Compl. ¶ 20; Pleading No. 73, Def.'s Mem. of Law in Supp. of Mot. for Partial Summ. J., David Hagen Aff. ¶ 3.)

In April 1998, PrimeTV entered into a Sales Agency Agreement with DIRECTV which required PrimeTV to sell satellite equipment to end users, install the equipment and service the equipment after the sale. (Hagen Aff. ¶ 6; Sales Agency Agreement, Appendix I ("App. I") to Def.'s Mem. at 25-45.) PrimeTV chose to subcontract its installation and service obligations, and on March

² Initially, Amerilink Corp. used the d/b/a "NaCom." Some time after 1999, Amerilink Corp. began using the d/b/a Amerilink National Installation Network. By the time this action was filed, Amerilink Corp. had been purchased by Radio Shack Corporation and changed its name to Radio Shack Installation Services. (Carpenter Aff. ¶ 3.)

9, 1999, PrimeTV entered into a contract with Amerilink (the “1999 Agreement”) pursuant to which PrimeTV would send installation requests to Amerilink and Amerilink would perform the requested installations. (Hagen Aff. ¶ 7; 1999 Agreement, App. I at 49-52.)

Pursuant to the Sales Agency Agreement, DIRECTV pays PrimeTV a Prepaid Programming Commission (“PPC”) for each subscription sale that results in activation of programming for an end user. In addition, DIRECTV pays PrimeTV monthly Continuing Service Fees (“CSFs”) for the first five years that a subscription remains in service. (Hagen Aff. ¶ 4; App. I at 24-45.) PrimeTV also receives Advance PPCs for each set of receiving equipment it sells to an end user. The Advance PPCs are received in the form of a reduction in the price of each receiver PrimeTV buys from its distributor, Perfect-10. If the receiver is not used in an activated subscription within 90 days after Perfect-10 distributes the receiver to PrimeTV, PrimeTV is charged back the Advance PPC for that receiver. (Hagen Aff. ¶ 5; Buy Down Agreement, App. I at 46-48.)

Soon after entering into the 1999 Agreement, Amerilink and PrimeTV began to dispute the parties’ respective obligations under the contract. PrimeTV complained of various types of improper billing by Amerilink, and Amerilink claimed that PrimeTV had failed to pay for duly completed installations. (Hagen Aff. ¶ 8; Carpenter Aff. ¶ 21.)

On February 16, 2000, the parties entered into a second agreement (the “2000 Agreement”) which, among other changes, granted Amerilink a security interest in collateral consisting of PrimeTV’s accounts receivable, including those from DIRECTV, up to \$1,000,000. (Randy Carpenter Dep. at 76-77, 83, 111-12, 114 (App. I at 5-10); David Hagen Dep. at 84-85, 93 (App. I at 21-23); 2000 Agreement (App. I at 88-94).) The security agreement conditioned Amerilink’s

rights to exercise its remedies as a secured party “[u]pon the occurrence of an event of default . . .”

(2000 Agreement ¶ 8, App. I at 93.) “Default” is defined, in pertinent part, as follows:

Debtor shall be in default under this Security Agreement . . . upon the happening of any of the following events or conditions: a. Debtor, after written notice from the Secured Party and reasonable opportunity to cure, not to exceed 30 calendar days, fails to pay amounts due for activated installations which have been confirmed as activated by DIRECTV . . . Disputes over the amount owed or timing of payments due to disagreements over activated status of installed receivers are hereby specifically excluded from this agreement, and do not constitute a default under this agreement.

Id. ¶ 7, App. I at 92-93.

The relationship between the parties deteriorated further when PrimeTV’s owner, David Hagen, allegedly received information leading him to believe Amerilink was activating installation orders from PrimeTV in the name of Radio Shack, Amerilink’s parent company. (Annette Hagen Dep. at 66-67 (App. I at 18-19); Email dated July 28, 2000, App. I at 87.) The parties stopped doing business with each other in late summer 2000. (Hagen Dep. at 218 (App. I at 24); Carpenter Aff. ¶ 22.)

In October 2001, subsequent to filing this lawsuit, counsel for Amerilink contacted DIRECTV by letter and demanded that, pursuant to the security agreement, DIRECTV begin paying all commissions due to PrimeTV directly to Amerilink. (Letter dated Oct. 3, 2001, App. I at 99-103.) This letter prompted DIRECTV to file the interpleader action that is currently before the Court.

III. Summary Judgment Standard of Review

The summary judgment standard of review under Rule 56 of the Federal Rules of Civil Procedure is well established. A party is entitled to judgment as a matter of law upon a showing that

"there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). The material facts are those identified by controlling law as essential elements of claims asserted by the parties. A genuine issue as to such facts exists if the evidence forecast is sufficient for a reasonable trier of fact to find for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). No genuine issue of material fact exists if the nonmoving party fails to make a sufficient showing on an essential element of its case as to which it would have the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). In evaluating a forecast of evidence on summary judgment review, the court must view the facts and inferences reasonably to be drawn from them in the light most favorable to the nonmoving party. *Anderson*, 477 U.S. at 255.

When the moving party has carried its burden, the nonmoving party must come forward with evidence showing more than some "metaphysical doubt" that genuine and material factual issues exist. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986), *cert. denied*, 481 U.S. 1029 (1987). A mere scintilla of evidence is insufficient to circumvent summary judgment. *Anderson*, 477 U.S. at 252. Instead, the nonmoving party must convince the court that, upon the record taken as a whole, a rational trier of fact could find for the nonmoving party. *Id.* at 248-49. Trial is unnecessary if "the facts are undisputed, or if disputed, the dispute is of no consequence to the dispositive question." *Mitchell v. Data General Corp.*, 12 F.3d 1310, 1315-16 (4th Cir. 1993).

IV. Discussion

a. PrimeTV's Motion for Partial Summary Judgment and to Modify Orders

PrimeTV moves the Court for partial summary judgment on the issue of Amerilink's liability to PrimeTV for breach of the security agreement contained in the 2000 Agreement. PrimeTV maintains that under the security agreement, Amerilink may only exercise its remedies as a secured

party upon the occurrence of “default.” PrimeTV asserts that any amounts “in dispute” are excluded from the definition of “default,” and that the entire amount claimed by Amerilink is disputed by PrimeTV. Thus, PrimeTV claims that Amerilink breached the security agreement by contacting DIRECTV and attempting to require DIRECTV to pay PrimeTV’s commissions directly to Amerilink in the absence of “default.” As a penalty for Amerilink’s breach, PrimeTV requests the Court to relieve PrimeTV of its obligation to make weekly \$15,000 payments into the Court’s registry and to refund the amounts PrimeTV has already so paid.

After close consideration of the security agreement, the Court finds that the language contained in the definition of “default” is ambiguous and susceptible to more than one reasonable interpretation. The material sentence reads as follows: “Disputes over the amount owed or timing of payments due to disagreements over activated status of installed receivers are hereby excluded from this agreement, and do not constitute a default . . .” (App. I at 92-93.) This sentence *can* be interpreted to mean what PrimeTV claims it means – that *any* dispute over the amount owed is excluded from the definition of default. However, the sentence can *also* be interpreted to mean that only disputes over the amount owed *due to disagreements over activated status of installed receivers* are excluded from the definition of default, as Amerilink urges. This ambiguity is troublesome and is not resolved by the parties’ attempts to resort to extrinsic evidence in their briefs. The Court is not in a position to determine which interpretation is the more reasonable as a matter of law. This is a matter for the trier-of-fact. **IT IS THEREFORE ORDERED** that PrimeTV’s motion for partial summary judgment and to modify orders (Pleading Nos. 71, 150) be **DENIED** as to PrimeTV’s claim that Amerilink breached the security agreement.

PrimeTV has also moved the Court for summary judgment on Amerilink's claim for *quantum meruit* on the ground that the existence of the 1999 and 2000 Agreements bars such a claim, citing *Booe v. Shadrick*, 322 N.C. 567, 570, 369 D.E.2d 554, 4556 (1988) and *G&S Business Servs., Inc. v. Fast Fare, Inc.*, 94 N.C. App. 483, 487-88, 380 S.E.2d 792, 795 (1989).

The Court finds merit to PrimeTV's argument. Under North Carolina law, a party's admission in its pleadings of the existence of an express contract is "an insurmountable bar to recovery" in *quantum meruit*. *G&S Business Servs., Inc.*, 94 N.C. App. at 487, 380 S.E.2d at 794-95 (citation omitted). In this case, Amerilink pleaded the existence of two contracts with PrimeTV in its complaint and has consistently maintained throughout this lawsuit that the terms of these contracts dictate the amounts owed to Amerilink by PrimeTV. (Compl. ¶¶ 3-7.) Amerilink's argument that it should be permitted to plead breach of contract and *quantum meruit* in the alternative pursuant to *Thormer v. Lexington Mail Order Co.*, 241 N.C. 249, 253, 85 S.E.2d 140, 143-44 (1954) and Rule 8(e) of the Federal Rules of Civil Procedure is unavailing. In *Thormer*, the jury found that there was *no express contract* between the parties. *Id.* at 250-51, 85 S.E.2d at 142. In those circumstances, recovery was permitted in *quantum meruit*. In contrast, both parties in this action agree that the 1999 and 2000 Agreements govern the parties' business relationship. **IT IS THEREFORE ORDERED** that PrimeTV's motion for partial summary judgment (Pleading Nos. 71, 150) be **GRANTED** as to Amerilink's *quantum meruit* claim.

b. Amerilink's Motion for Summary Judgment

Amerilink moves the Court for summary judgment on its breach of contract claim, alleging that the 1999 and 2000 Agreements "unequivocally" obligate PrimeTV to pay Amerilink for installation services performed plus interest. (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 13.)

Amerilink contends the amount PrimeTV owes is \$1,522,185.78, based on the calculations and analysis of its expert, Kelly J. Todd. Amerilink asserts that \$966,719.87 of the total amount owed is subject to collection under the security agreement from the amounts deposited by PrimeTV into the registry of the Court.

After consideration of the voluminous materials submitted in support of Amerilink's motion, the Court has little difficulty in finding that summary judgment on Amerilink's breach of contract claim is not appropriate. The record is replete with disputed issues of fact which cannot be resolved as a matter of law. By way of example, although by no means an exhaustive list, the following are material facts that are disputed by the parties:

- whether Amerilink was obligated to activate satellite programming for the customer before it was entitled to be paid by PrimeTV;
- which types of disputes are excluded from the definition of "default" in the security agreement;
- whether specific installations were actually performed by Amerilink;
- whether Amerilink improperly billed PrimeTV for certain installations; and
- whether PrimeTV failed to pay Amerilink for certain completed installations.

The Court also notes that each party has submitted fairly comprehensive expert reports in this case. The opinions of their respective experts differ sharply both in their conclusions as to what is owed to whom and in the methodology used to reach those conclusions. The Court is not in a position to decide which expert's opinion is entitled to more weight as a matter of law – this is uniquely the province of the trier-of-fact. *See TFWS, Inc. v. Schaefer*, 325 F.3d 234 (4th Cir 2003)(reversing the district court where the court had arrived at its conclusion by weighing conflicting expert reports and giving greater weight to one expert's report over the other). Accordingly, **IT IS ORDERED** that Amerilink's motion for summary judgment (Pleading Nos. 74, 153) be **DENIED** as to its claim for breach of contract.

Amerilink has also moved for summary judgment on PrimeTV's counterclaim for breach of contract. For the same reasons the Court finds summary judgment inappropriate on Amerilink's breach of contract claim, **IT IS ORDERED** that Amerilink's motion for summary judgment (Pleading Nos. 74, 153) be **DENIED** as to PrimeTV's counterclaim for breach of contract.

Finally, Amerilink has moved for summary judgment on PrimeTV's counterclaims of fraud and unfair or deceptive trade practices.³ Amerilink contends that an unfair or deceptive trade practice claim cannot be based solely on a breach of contract, and that PrimeTV has failed to show that it relied on Amerilink, an "essential element of fraud," because PrimeTV failed "to pay Amerilink for over \$1 million worth of installation services." (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 24.) Amerilink also argues that the only evidence on which PrimeTV relies to support these claims constitutes "inadmissible hearsay." (Pleading No. 109, Pl.'s Reply to Def.'s Opp. to Pl's Mot. for Summ. J. at 14.)

The Court finds that PrimeTV's fraud counterclaim must be dismissed, but for a different reason than that proffered by Amerilink. Claims of fraud in North Carolina require that the claimant demonstrate intent to deceive by the party accused of committing the fraudulent acts. *Myers & Chapman, Inc. v. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988). The only admissible

³ Amerilink also argued for dismissal of PrimeTV's counterclaims for "trover and conversion." (Pl.'s Mem. in Supp. of Mot. for Summ. J. at 24.) However, the Court was unable to find such counterclaims in PrimeTV's Answer and Counterclaims. The Court will not address such claims in this opinion.

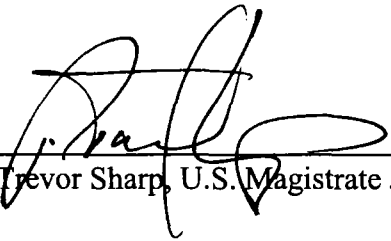
evidence⁴ cited by PrimeTV in support of its fraud counterclaim is the opinion of PrimeTV's expert that 43 of Amerilink's paper work orders show that equipment other than that of PrimeTV was installed. Standing alone, this evidence is too vague as a matter of law to establish the requisite intent to deceive on the part of Amerilink.

Similarly, PrimeTV's unfair or deceptive trade practices claim does not survive summary judgment. This Court has previously recognized that where a claimant bases an unfair or deceptive trade practices claim on a breach of contract, the claimant "must allege *substantial aggravating circumstances*" attending the breach of contract to support a claim of unfair or deceptive trade practices in North Carolina. *Charlotte Commercial Group, Inc. v. Fleet Nat'l Bank*, No. 1:02CV00343, 2003 WL 1790882, *3 (M.D.N.C. Mar. 13, 2003)(unpublished opinion)(Bullock, J.)(emphasis added). Such "substantial aggravating circumstances" include "an intentional misrepresentation made for the purpose of deceiving another and which has the natural tendency to injure another" *Baldine v. Furniture Comfort Corp.*, 956 F. Supp. 580, 587 (M.D.N.C. 1996)(Tilley, J.). As discussed above, PrimeTV's evidence fails to show the requisite intent to deceive on the part of Amerilink.

IT IS THEREFORE ORDERED that Amerilink's motion for summary judgment (Pleading Nos. 74, 153) be **GRANTED** as to PrimeTV's counterclaims of fraud and unfair or deceptive trade practices.

⁴ The deposition testimony of David Hagen that end users had reported to him that subcontractors were installing equipment other than that of PrimeTV is hearsay, as is the deposition testimony of Annette Hagen that someone at DIRECTV informed her that installations were being activated in the name of Radio Shack. (Hagen Dep. 221-22 (App. II at 371-72); Annette Hagen Dep. 66-67 (App. I at 18-19).) Similarly, David Hagen's July 28, 2000 email regarding reports from a company called Pegasus that hundreds of their installation orders had been activated in Radio Shack's name is hearsay. (App. I at 87.)

The case is set for bench trial beginning at 9:30 a.m. on September 28, 2004 in Greensboro.



P. Trevor Sharp, U.S. Magistrate Judge

July 16, 2004